

APPENDIX A  
SUPREME COURT OF PENNSYLVANIA  
WESTERN DISTRICT

No. 81-1-26

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF TRANSPORTATION,

vs.

SHELLY & SANDS, INC., and  
BUCKEYE UNION INSURANCE CO.,

Appellants.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here  
ordered and adjudged by this Court that the  
judgment of the Commonwealth Court be, and  
the same is, hereby affirmed.

BY THE COURT,

/s/ Carl Rice  
Carl Rice, Esquire,  
Prothonotary

Dated: November 4, 1982

APPENDIX B  
IN THE COMMONWEALTH COURT  
OF PENNSYLVANIA  
No. 23 G.D. 1981

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF TRANSPORTATION,

Plaintiff,

vs.

SHELLY & SANDS, INC., and  
BUCKEYE UNION INSURANCE  
COMPANY,

Defendants.

O R D E R

AND NOW, this 15th day of April, 1981,  
the Petition to Open Judgment in the above-  
captioned case is hereby denied.

/s/ Robert W. Williams, Jr.  
ROBERT W. WILLIAMS, JR., JUDGE

APPENDIX C  
IN THE COMMONWEALTH COURT  
OF PENNSYLVANIA  
No. 23 G.D. 1981

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF TRANSPORTATION,

Plaintiff,

vs.

SHELLY & SANDS, INC., and  
BUCKEYE UNION INSURANCE  
COMPANY,

Defendants.

BEFORE: HONORABLE ROBERT W. WILLIAMS,  
JR., Judge

HEARD: April 14, 1981

CERTIFIED FROM THE RECORD

Jun 8 1981

/s/ Francis C. Barbush,  
Chief Clerk

## MEMORANDUM OPINION BY JUDGE WILLIAMS, JR.

Filed June 8, 1981

On April 15, 1981, this Court issued an Order denying a Petition to Open Judgment filed by Shelly & Sands, Inc. (S & S), defendants in this action. This Memorandum Opinion is written in compliance with Pa. R.A.P. 1925, pursuant to an appeal of that decision to the Pennsylvania Supreme Court.

On September 18, 1980, the Commonwealth of Pennsylvania, Department of Transportation (PennDOT) opened all the bids submitted relative to a state highway project. The bid from S & S was the lowest by approximately \$800,000.00 in a range of bids from \$5.9 million to \$4.1 million.

Within two business days after the

bid opening, S & S hand-delivered a letter to PennDOT withdrawing the bid because "the total tons of asphalt concrete required . . . was erroneously calculated," which error caused the unit price per square yard of asphalt to be estimated at \$5.25 per unit instead of \$10.50 per unit, which, S & S alleges, was the intended price. On October 29, 1980, S & S received a letter from PennDOT awarding the contract to it at bid price, and advising it that the bid could not be withdrawn after opening, pursuant to the provisions of Section 102.10 of Form 408, "Bidding Requirements and Conditions, Withdrawal of Proposals."

S & S refused to undertake the project. PennDOT subsequently filed suit in this Court, praying for judgment against S & S in the amount of the bond which it

posted with its bid, and confessed judgment against S & S in the amount of that bond, \$228,446.97. S & S filed a Rule to Show Cause why that judgment should not be opened, averring that its withdrawal of the bid is permitted by the language of Section 2 of the Act of January 23, 1974, P.L. 9, 73 P.S. §1602, which permits a bidder on a public contract to withdraw his bid within two business days of the opening thereof. However, that statute specifically excepts highway work from its purview.

S & S additionally argues that, since a factual issue exists as to whether the mistake in the bid was obvious, the judgment should be opened. Its basis for this argument is Pa. R.C.P. No. 2959(e), which requires the court to open judgment if the evidence would require submission of the

issue to the jury in a jury trial. However, this Court notes that there are numerous discrepancies in the unit prices of the various bids, similar to or greater than that put forth by S & S as the "obvious" error. PennDOT cannot be charged with the obligation to verify the accuracy of such discrepancies prior to accepting a bid. In light of the bid-breakdown tables provided to the Court in the stipulation of the parties, we cannot find that there is a factual issue which would activate the application of the above rule.

The next contention of S & S is that the exclusion of highway contractors from the benefit of the bid withdrawal provisions of 73 P.S. §1602 is a denial of equal protection. We find that argument to be without merit. Unlike other public contracts, highway projects are adminis-



tered by PennDOT. That simple fact sets such undertakings apart from other public contracts, which do not involve that agency's procedures. We cannot find merit in the constitutional argument asserted here.

In Travelers Indemnity Co. v. Susquehanna County Commissioners, 17 Pa. Commonwealth Ct. 209, 211-12, 331 A.2d 918, 920 (1975), this Court stated:

A firm bid rule has long been established in this Commonwealth. It declares that if a contractor discovers a clerical error in the bid any time after the bid opening, he is not entitled to withdraw his bid without forfeiting his bid bond as liquidated damages. . . .

The conditions of forfeiture are included in the instruction to bidders, all of which, of course, form a material part of the contract between the parties.

In the instant case, the provisions of the section of the bid instructions entitled "Withdrawal of Proposals" clearly



states: "Each and every bidder who submits a bid specifically waives any right to withdraw it," unless such withdrawal is made or confirmed in writing "before the hour of the date specified in the proposal for the opening there." This language, as a portion of the instruction to bidders, is a "material part of the contract between the parties," Travelers Indemnity, and thus precludes withdrawal two days after the bids have been opened and read.

We therefore deny the Petition to Open Judgment.

/s/ Robert W. Williams, Jr.  
ROBERT W. WILLIAMS, JR., JUDGE

APPENDIX D  
SUPREME COURT OF PENNSYLVANIA  
WESTERN DISTRICT  
No. 81-1-26

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF TRANSPORTATION,

Appellee,

vs.

SHELLY & SANDS, INC., and  
BUCKEYE UNION INSURANCE CO.,

Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT  
OF THE UNITED STATES

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Notice is hereby given that SHELLY & SANDS, INC., and BUCKEYE UNION INSURANCE CO., appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Pennsylvania entered November 4, 1982, affirming the judgment of the Commonwealth Court which denied appellants'

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petition to open judgment.

This appeal is taken pursuant to  
28 U.S.C. §1257(2).

PLOWMAN AND SPIEGEL

By /s/ Jack W. Plowman  
Jack W. Plowman  
Attorneys for Appellants

3400 Grant Building  
Pittsburgh, PA 15219  
(412) 471-8521

Dated; January 26, 1983

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the within Notice of Appeal to the Supreme Court of the United States has been made on all parties required to be served. Service on the appellee herein, Commonwealth of Pennsylvania, Department of Transportation, has been effected by directing a true and correct copy of the Notice of Appeal, via First Class Mail, postage prepaid, to its counsel of record:

George D. Wenick  
Assistant Counsel  
Commonwealth of Pennsylvania  
Department of Transportation  
Office of Chief Counsel  
Harrisburg, Pennsylvania 17120

PLOWMAN AND SPIEGEL

By /s/ Jack W. Plowman  
Jack W. Plowman  
Attorneys for Appellants  
3400 Grant Building  
Pittsburgh, PA 15219  
(412) 471-8521

Dated: January 26, 1983